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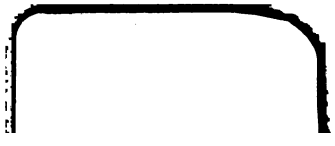

# John Marshall

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# JOHN MARSHALL

CHIEF JUSTICE
UNITED STATES SUPREME COURT
1801–1835

## A DISCOURSE

DELIVERED AT THE

## FIRST PARISH CHURCH

FRAMINGHAM

JANUARY 27th, 1901

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By CALVIN STEBBINS

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# JOHN MARSHALL

A WISE JUDGE WILL INSTRUCT HIS PEOPLE.

*The Wisdom of Jesus the son of Sirach x: 1.*

The Constitution of the United States, for so important a document, is remarkable on account of its brevity. You can read it aloud, amendments and all, in twenty-three or four minutes. It is only about half as long as the Constitution of the little Commonwealth of Massachusetts. Its lofty purposes are stated with great clearness and force in the preamble. But the powers granted to the federal government by the people were of such a general nature that differences of opinion and conflict of laws would inevitably arise. For interpretation and adjudication a court of final appeal was established, and its members were placed beyond the reach of party spirit or popular feeling. This court, the Supreme Court of the United States, has been justly called "the living voice of the Constitution."

Under this Constitution, as construed by the Supreme Court, we have become one of the most progressive peoples of modern time. Our material prosperity has been unprecedented. And with our increasing strength there has steadily been growing through the length and breadth of our vast domain both the sentiment and the conviction, that we are one people, that we are a nation, with a general government for general purposes and local governments for local purposes. To use the language of the court itself:—"We are an indestructible Union of indestructible States."

This great tribunal did not attract much attention at its organization. Even the place where its sessions were held during the first twelve years of its existence cannot now be pointed out. Its duties were not onerous, as the first Chief Justice, John Jay, found time to visit England and negotiate the famous treaty which bears his name. Nor could it then have been regarded as a post of great honor, since Jay resigned it to become governor of the State of New York. A lawyer would hardly do that today to be president of the United States.

After the resignation of Chief Justice Ellsworth, near the close of the year 1800, President Adams, then in the last months of his administration, saw an opportunity to check what seemed to him the dangerous tendencies of the party just coming into power and perpetuate the principles which he thought essential to the prosperity of the country. On the 31st of January, 1801, he wrote to the Secretary of War and asked him "to execute the office of the Secretary of State so far as to affix the seal of the United States to the enclosed commission to the present Secretary of State, John Marshall of Virginia, to be Chief Justice of the United States." Mr. Adams used to say that the appointment of John Marshall to be Chief Justice was the greatest service he had ever rendered his country.

By a strange irony of Fate the first duty that fell to the new Chief Justice was no other than to administer the oath of office to the incoming President, Thomas Jefferson. To us, as we look back to that Fourth of March, a strange scene presents itself. Two men who had no sympathy with each other and no opinions in common, who looked upon each other as anything but honorable or honest, stood face to face, and each was perhaps inwardly pledging himself to wage war to the knife upon the other.

The inauguration over, the two great representatives of the antagonistic elements in the political life of the young republic went their ways, — the President and his party to

rule the country for years to come, the Chief Justice to his untrodden, thorny and difficult path. He was an object of party hate, but the hate was not unmixed with fear. He had hardly entered upon the discharge of his duties when the operations of his court were suspended for fourteen months. But his patience was superb. He had a broad, powerful, subtle and prophetic mind, and a genius for the law as great as Napoleon had for war. He was indeed modest and retiring, but he did not lack courage and firmness and his powerful personality made itself felt in time. He gained a victory for his principles in the end along all lines; he won for his court the respect of a reluctant people, and lifted it from obscurity to a place among the most august tribunals on earth.

Few men in our history have had their courage so taxed as Marshall. The President was inimical to him personally, the administration and the victorious party which had brought it triumphantly into power were hostile to the court over which he was called to preside. This was surely bad enough, but it was by no means all. The nation, the Constitution and the laws were young. The court itself was an untried experiment. Such an institution was altogether unknown to the history of law, ancient or modern. There was no experience to guide him. But he felt that the destinies of the nation hung upon his court, and we know now they did.

No man ever felt more profoundly the truth of the great statement of old Richard Hooker:—"Of law nothing less can be said than that her seat is in the bosom of God, her voice is the harmony of the world: all things in heaven and earth do her homage, the very least as feeling her care, the greatest as not exempt from her power: both angels and men and creatures of what condition soever, though each in different sort and manner, yet all with uniform consent admiring her as the mother of their peace and joy."

No man ever felt more deeply than Marshall the dignity and the responsibilities of the office he held. Rarely if ever have great powers been so conscientiously and courageously devoted to the discharge of the duties of such an office. He believed in an independent judiciary and he held his court in regions high above the threats of power or the menaces of the people's whims, which, as has been well said, are too often mistaken for the will of the people. In no case did he ever shield himself from odium by accepting the judgment of a prejudiced public as the judgment of his court.

During a famous state trial, the trial of Aaron Burr, which was held at Richmond, the popular feeling ran high against Burr and all the powers of the administration were used to secure a conviction. The prisoner at the bar was, in the eyes of the Chief Justice, the murderer of his friend Alexander Hamilton; but, bad as his reputation was and under the suspicion of treason against the country which had honored him with the second place in the gift of her people, he could not be convicted in that court without the evidence which the Constitution required in such cases. For once the Chief Justice alluded, in his charge to the jury, to the state of public feeling. The temper of his mind and the moral grandeur of his character are clearly revealed in the familiar paragraph beginning:— "That this court dares not usurp power is most true. That this court does not shrink from its duty is no less true."

But Marshall was a great man as well as a great chief justice. Many of the men whom the world accounts great have limitations that are painfully apparent when we are brought into close relations with them. Like the border hills on which the horizon seems to rest they look very beautiful but oftentimes

> "'T is distance lends enchantment to the view
> And robes the mountain with its azure hue."

Marshall belonged to that rare class of men who make human nature beautiful on close inspection. The graces of his affections in the quiet of home, and his thoughtful kindness to all in the ordinary relations of life, were as beautiful as his abilities on the bench were great.

He was indeed a man of head, but his heart was a perennial fountain of good feeling for all. He was amiable as well as great, and charmed all who came near him by the native kindness, gentleness, simplicity and modesty of his character. The awe that the great Chief Justice would very naturally inspire on account of the high office he held and his commanding influence was lost in social life in reverent admiration for the man. There was something genuine in his manners, in all that he said, and in everything that he did. "I love," said an eminent advocate, "I love his laugh, it is too hearty for an intriguer."

Coleridge used to say that he had seldom known or heard of any great man who had not much of the woman in him. This was eminently true of Marshall. His majestic intellect was coupled with all the softer feelings that belong so pre-eminently to woman and for woman he had a high regard. In acknowledging a copy of Story's Phi Beta Kappa Oration at Cambridge he wrote:—"I have read it with real pleasure and am particularly gratified with your eulogy on the ladies. It is a matter of great satisfaction to me to find another Judge, who, though not so old as myself, thinks justly of the fair sex, and commits his sentiments to print." He however, expresses astonishment at the fact that Story omitted the name of Miss Austen from his list of favorites, and adds:—"I shall count on your making some apology for the omission."

He was greatly delighted with a fine passage on the Lady Arabella Johnson in another of Story's orations, and wrote to the author expressing his pleasure and added a neat compliment to the silent partner. "Present my compliments to Mrs. Story and say to her for me that a

lady receives the highest compliment her husband can pay her when he expresses an exalted opinion of the sex, because the world will believe that it is formed on the model he sees at home."

Harriet Martineau saw him in Washington the year before his death. He was then an old man, having almost reached the summit of eighty years. "How delighted we were," she writes, "to see Judge Story bring in the tall, majestic, bright-eyed old man, old by chronology, by the lines in his composed face, and by his services to the republic, but so dignified, so fresh, so present to the time, that no compassionate consideration for age dared to mix with the contemplation of him." She notes that, "He maintained through life and carried to his grave a reverence for woman, as rare in its kind as in its degree."

His emotions were easily touched and he was not ashamed of them. When Daniel Webster closed his four hour argument in the Dartmouth College case, a piece of cold legal reasoning: He paused for a moment, then turning to the court, and with breast heaving with stormy emotions, made his appeal as a college boy for his Alma Mater. It was one of the most remarkable scenes ever witnessed in that court or in any other. "The Chief Justice leaned forward as if to catch the slightest whisper, the deep furrows of his cheeks expanded with emotion and his eyes suffused with tears."

Marshall was a lover of the stage and took high delight in seeing Fanny Kemble. He seemed never to understand the applause when he entered his box, but the actress was as perfect a master of his emotions as of the younger of the audience.

His nature was generous and open as the day. He had the rare faculty of keeping the friendship and regard of even those whom he had superseded in office. For his opponents, in very many cases, he cherished the kindest personal feelings, as for James Madison, the mention of

whose name would kindle his enthusiasm. Political warfare waged on the plain of personal vituperation was very distasteful to him, and nothing grieved him so much as when his friends were led into unbecoming recriminations.

To him friendship was not only one of the highest privileges of human nature, but one of its purest enjoyments. "The esteem of those we esteem," he writes, "is among the most delightful sensations of the human nature:" and again he states the same thought in another way:— "No gratification is more pure or more exalting than the regard of those we esteem."

The gentle qualities of his heart did not, as is sometimes the case, disturb the balance of his mind, but were rather an inspiration to his powers of reasoning, for, with prophetic imagination, he foresaw the evil that would be escaped and the good that would result from the principles he sought to establish.

He was singularly independent and singularly dependent upon others. He was very anxious to hear arguments in his court, listened with patient attention, and always treated Advocates of the cause with great courtesy, but he analyzed their discussion with the remorseless logic of a mind that went to the root of the subject at once. He had an extraordinary power of terse and lucid statement. He saw the fallacy of an argument as by intuition, and he had what William Wirt called "a superhuman power" to reduce it to its simplest term, and he did not leave it until he had deduced from it fatal conclusions. When he approached one of these arguments and felt that he must get it out of his way, he had a favorite phrase which he used as a sort of prelude to the destruction which was coming. Daniel Webster once said to Judge Story:— "When Judge Marshall says, 'It is admitted,' Sir, I am preparing for a bomb to burst over my head and demolish all my points."

His legal learning was not great, but his sense of right, legal and moral, was both great and clear. He seldom cited authorities in his judgments, and in several which are looked upon as his greatest he has fearlessly proceeded on the strength of his own reasoning. He is reported to have sometimes said in closing some of his masterly decisions:—"These seem to me to be the conclusions to which we are conducted by reason and the spirit of the law. Brother Story will furnish the authorities."

One of the most remarkable things about the Chief Justice was the simplicity of his mind. He was perfectly at home in discussing the great problems of the law, but his mind proceeded on very simple and commonplace truths that lie close to nature and to life. To the mind of the ordinary man, it is to be feared, in as well as out of the profession, the law is the most inexplicable of all subjects that do not claim to be a mystery to start with. There is some satisfaction in knowing that a thing is a mystery, for that settles the question. There is an impression, however, more or less distinct, that the law is not a mystery. The law in Marshall's hands, although the case might involve the most perplexing constitutional questions, seemed to be covered by Professor Huxley's definition of science as "nothing but trained and organized common sense."

When Marshall came to the bench he found the simple and admirable mechanism of our national judicial system in running order. It had been conceived by the genius of his predecessor, Chief Justice Ellsworth. It now became his duty to set it running. It makes one shudder to think of the results, had a weak man or a partisan of the popular doctrine of the age been in his place.

"It would be an instructive historical study," says an eminent lawyer and statesman, "to take the great constitutional judgments of John Marshall in cases where the decisions of State courts were reversed, and consider what

would have been the course of our history had the decision been otherwise. Reverse Gibbons *v.* Ogden, and commerce would become subject to the varying laws and manifold exactions of thirty-eight States. Reverse Dartmouth College *v.* Woodward, and every institution of learning and charity becomes subject to a popular caprice. Reverse McCulloch *v.* Maryland, and the policies which saved the Union become unlawful."

The first case involving a constitutional question brought before Chief Justice Marshall was the celebrated case of Marbury *v.* Madison. He was in this brought into open opposition to the administration, as the case involved some of the President Jefferson's favorite opinions on which he had been acting. But the Chief Justice neither hesitated nor flinched. His judgment was a very carefully prepared paper and foreshadowed his doctrine of the supremacy of the Constitution. He announced the inviolability of contracts,—a hard hit at the President; he declared an act of Congress not made in pursuance with the Constitution void, and, with a wealth of reasoning that put the question beyond dispute from that day to this, he declared that all officers, ministerial and executive, all over the country were under the control of the courts; for this, he said, "makes the difference between a government of laws and a government of men." The President and his cabinet were furious, but there was no remedy; the Chief Justice understood his court, knew his ground and had decided nothing outside the case.

The existence of our nationality has been menaced from the first by a patriarchal institution and by a set of ultra opinions on the rights of the states. Early in our history they showed what might be called an elective affinity for each other, and finally they joined hands and took each other for better or worse, for richer or poorer, to love and to cherish until they died together.

Marshall was a slaveholder by inheritance, but he held the views common among the best men of his time and State. He held with them that it was the plague-spot on our political system, but like them he was helpless and could not so much as suggest a remedy for an evil so gigantic. He saw that in the nature of things it would develop into something dreadful. To him the slave trade, as he said, "was a horrid traffic detested by all good men." He spoke of the institution itself as "more degrading to the master than to the slave." In a letter to Col. Timothy Pickering, written the 20th of March, 1826, he goes to the heart of the subject. "I concur with you," he writes, "in thinking that nothing portends more calamity and mischief to our Southern States than their slave population. Yet,"—and this is the pith of the whole matter—"yet they seem to cherish the evil and to view with immovable prejudice and dislike everything which may tend to diminish it. I do not wonder that they should resist any attempt, should one be made, to interfere with the rights of property, but they have a feverish jealousy of measures which may do good without the hazard of harm, that is, I think, very unwise."

Thus, while he shared the fears of many thoughtful men, that dangers would arise from the slaves themselves, he saw, however, more clearly and more deeply, and not without alarm, the rise and growth of a spirit the result of which no human wisdom could divine. He could see but one result, and that was disastrous to the Union. "I yield slowly and reluctantly," writes the aged Chief Justice, "to the conviction that our Constitution cannot last. The case of the South seems to me desperate. The Union has been prolonged thus far by miracles I fear they cannot endure."

Vaulting ambition may hope to jump the world to come, but it sometimes overleaps itself in this world. The spirit that Marshall so feared, at last led its devotees

to throw an industrial institution based on status in the path of an industrial civilization based on contract. The conflict had been allowed, by "a power that works for righteousness not of man," to reach that stage in the debates of the senate, before it appealed to arms, where compromise was absolutely impossible. When the crisis really came no power on earth could call a halt or a truce, and heaven waited in silence the result. It was a veritable death-grapple. In the eternal fitness of things no military genius however great, no courage however heroic, could save slavery and its ally State-Rights from going with hideous ruin down to "the coasts of dark destruction," or impair the supremacy of the Constitution of the United States.

In the preparative for this glorious consummation the great Chief Justice was an important and influential factor. Justice has hardly been done as yet to the influence his masterly judgments had in stimulating and cherishing the sentiment of union and the supremacy of the Constitution.

Marshall was by nature an ardent patriot. He fought in the Revolution, not for Virginia alone, but for the whole country. In his first public address, he spoke of "our fellow citizens of Boston." A boy in his teens, as lieutenant he led his men at the brilliant charge at Great Bridge; as captain he fought at Iron Hill, Brandywine, Germantown and Monmouth, and charged with "Mad" Anthony Wayne at Stony Point. He endured the winter at Valley Forge, and was everywhere looked upon as a cheerful man, endowed with great patience, courage and sound judgment.

When the war was over and the Federal government supplanted the Confederation, he was ready for even so great a change. He was an ardent believer in the principles of the Constitution and in the great possibilities of the American people under it, and his civic virtues were quite as conspicuous as his military. He never sought office,

but his services were more than once required in the State Legislature, and he was a member of the convention of Virginia that ratified the Constitution. He was a Federalist, and his party was always in a hopeless minority, but his personal popularity always secured him an election.

His reputation soon passed beyond the boundaries of his State. President Adams appointed him one of the envoys extraordinary to France. The embassy was a great failure. The Directory which then governed France with Napoleon Bonaparte at its head, notified, through its agents called X, Y, Z, the representatives of the little republic under the setting sun, that it would be necessary to give the Directory 50,000 pounds, or 250,000 dollars, to be divided among its members and negotiate a loan from the United States to France before grievances could be listened to or a treaty negotiated. The whole matter, so insulting to America, was at last disposed of by Marshall in the declaration: "No! no! Not a penny." On his return to America he was greeted with great enthusiam. At a banquet given in his honor a toast was proposed, the spirit of which has been our policy as a nation ever since:—"Millions for defense but not one cent for tribute."

At the personal request of Washington, then living in honorable retirement at Mount Vernon, he became a candidate for Congress and was elected. But his congressional career was short, as he resigned at the close of the first session to become Secretary of State, from which office he was raised by President Adams, as already stated, to the Supreme Bench.

He entered upon his high office with, as we have seen, large experience of affairs, and with high but practical ideas of law and government. He looked from the first upon the government under the Constitution as a national government. It was to him not a mere confederacy or league of states; nor did he look upon the Constitution

as a compact between sovereign and independent states; but he looked upon the national government as a veritable government endowed by the people in the Constitution with powers to protect and perpetuate itself and execute all the laws made by Congress in pursuance of the Constitution.

It is safe to say that no instrument of equal length has excited so much discussion as our Constitution. A distinguished English publicist goes so far as to say that "with perhaps the exception of the New Testament, the Koran, the Pentateuch and the Digest of Justinian, no writings have employed so much ingenuity and labor as the American Constitution in sifting, weighing, twisting and torturing its text."

This discussion was indeed unexpected, but yet it was perfectly natural. It arose, not because the principles of the Constitution were imperfectly or incorrectly stated, but because they were great principles and were broadly stated. No statement of great principles can be made with mathematical precision. There must be room, yes, space for them to stand in. They cannot be roofed in, they must have the sky over them. You cannot cut a colossus from a pebble and you cannot hide a colossus in a pebble.

Amid the babel of tongues and the sharp conflict of local interests which sometimes verged upon an appeal to arms, the interpretation of this remarkable instrument became a matter of supreme importance. The vital question when reduced to lowest terms was this:—Shall the Ship of State be anchored in the harbor of State Rights, there to rot, or shall it boldly ride the seas of time under the stars of great principles? If it should venture out of the harbor and be caught by a freshening breeze, has every plank of which it is composed a right to secede? or is it a real ship, built upon honor by men with empires in their brains, going on a great mission,

with the confidence of a loyal people who love Liberty and Union, to contend with what comes:

> " Her ports all up, her battle-lanterns lit,
> And her leashed thunders gathering for their leap."

Fortunately, or, as I believe, providentially — for there must always be a sufficient reason for the appearance of a great man in history — God never uses a locomotive to draw a straw, — a man was raised up able to interpret our Constitution according to Law as seen in the light of the great purposes for which it was made, and thus prepare the way for the triumphant story that has followed, of increasing prosperity, liberty, influence and power.

This instrument, according to the Great Chief Justice, contains an enumeration of powers expressly granted by the people to their government. To say that the intention of the instrument must prevail, that this intention must be collected from its words, that its words are to be understood in the sense in which they are generally used by those for whom the instrument was intended, that its provisions are neither to be restricted into insignificance nor extended to objects not contemplated in them, nor contemplated by its framers, was the opinion that he ever kept in view as the foundation of his decisions and his judgments, and his principles of interpretation cannot be controverted.

Many eminent lawyers were associated on the bench with Chief Justice Marshall during his thirty-four years' tenure of office. Some were appointed to counteract his influence. But the pre-eminence of his great personality and lofty character is strikingly illustrated by the fact that, of the sixty-one decisions of cases involving constitutional questions during his long term of office, in only one did he read a dissenting opinion.

Lawyers as eminent as any in our history appeared at the bar. There were men there then who made even Daniel Webster put forth all his powers. They did much, without doubt, to illuminate the questions before the court. But all these men, Webster among them, looked up to the Chief Justice. His majestic intellect, the elevation of his character, his genius for the law, his courage and his caution, make him for them all the Great Chief Justice.

But what has been the result of his work? When John Marshall took his seat upon the Supreme Bench, a century ago, the Constitution of the United States was a piece of paper, a written document, rigid and stiff as a dead man's hand. Under his touch it showed signs of life, became wonderfully flexible and began a marvelous growth, a growth of power, strong and quick to protect, gentle and generous in the government of a people who enjoy as large an amount of liberty as the most favored nations on earth in the past or the present.

Mankind have always held in high esteem, and rightly, the great lawgivers. They have laid the foundations of states and empires and made possible the realizations of at least some measure of justice and right. But as civilization advances, as high a place belongs to the great lawyer, to the great expounders of the law, for they develop and make clear its principles and their application to life. It was a saying of Goethe that if you plant an acorn in a vase you must stunt the oak or break the vase. The great expounders of the law without violence give the oak a chance to grow.

It is no exaggeration, as one of our own great jurists has said, to call Marshall "the second maker of the Constitution." So impressed was Professor Bryce, the latest foreign student at our institution, with what we owe to Marshall that he said:—"I will not borrow the phrase which was said of Augustus, that he found Rome of brick and left it of marble, because Marshall's function was not

to change but to develop. He found the Constitution at the beginning of the century what Washington then was, a symmetrical ground plan for a great city, and left it what Washington has become, a splendid and commodious Capital, worthy to be the centre of a mighty nation."

And he adds:—"His work of building up and working out the Constitution was accomplished not so much by the decisions he gave as by the judgments in which he expounded the principles of these decisions, judgments which, for their philosophical breadth, the luminous exactness of their reasoning, and the fine political sense which pervades them, have never been surpassed and rarely equaled by the famous jurists of modern Europe or ancient Rome."

This is indeed a high tribute to the genius of our great Chief Justice, but there is another greater yet that speaks out of the growth and expansion of our national institutions and life. In a government like ours:—"a government of laws and not of men," there are few, if any greater blessings, that even Heaven itself can bestow upon us as a people, than a great lawyer. This blessing came to us in John Marshall. He came at the right time, when our political ideas and institutions were in a formative state, and his influence has increased with the advancing years of the century until, in our minds, "Liberty and Union have become one and inseperable," and Liberty and Law have come into such close relations that we say of them:—

> **"O Law, fair form of Liberty, God's light is on thy brow;**
> **O Liberty, the soul of Law, God's very self art thou."**

It is indeed a happy coincidence, that as the nineteenth century goes out, we come on the threshold of the twentieth to the centennial of so great an event, an event of profoundest import and influence upon our destiny as a

nation as the elevation of John Marshall to be the Chief Justice of the Supreme Court. As we look at his tremendous personality and his exalted character, and trace the amazing influence he has exerted upon our national life, we can feel a new courage, because we find that our hopes for our country have foundations that cannot be shaken, for :—

**"On God and Godlike men we build our trust."**

Out of the glorious century that has just triumphantly closed, out of its splendid achievements for man come many voices of the great and the good, but none speak in clearer accents than those out of our own marvelous history, and none of these more clearly than that of the patriot lawyer, the Chief Justice, who laid the deep foundations of "Liberty and Union" in Law, and by his construction of the Constitution gave us a nationality, and gave the nation a future, a future of ever increasing intelligence and power to serve the highest interests of humanity, and in reverent tones it says to every American citizen :—

**"Pray God our greatness may not fail**
**Thro' craven fears of being great."**

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